

October 26, 2011

RE: Proposed Changes to MRPC 7.3
ADM File No. 2002-24

Dear Clerk:

The following comments are respectfully submitted in opposition to the proposed changes to MRPC 7.3 (Direct Contact With Prospective Clients).

1) A Solution in Search of a Problem

My firm has participated in direct mail lawyer advertising since it became permissible under *Shapero v Kentucky Bar Ass'n*, 488 US 466 (1988). I begin my comments by asking "who has been complaining about receiving direct mail letters?" Searching our firm records for at least the past 10 years, I find not a single instance where a letter recipient, or his/her lawyer, has called or written to express concern or offense at having been contacted by mail, whether within a day, a week, or months after the incident giving rise to a cause of action.

We would expect to be the first to hear about it if a potential client, or the family member of such a person, felt aggrieved, dismayed or misled about having received a mailing from a lawyer. Attorneys who had already been retained to represent someone who later received a direct mail letter would not be reluctant to call us if they felt that our letters constituted interference with their representation. It would be anticipated that bar grievances would be filed with some regularity by members of the public who found this form of advertising unprofessional or distasteful.

To the contrary, we have encountered not a single example of a negative reaction to our advertising, going back for the decade during which we can access records that would reveal such information. The overwhelming reaction to our letters is one of appreciation for offering information and immediate access to assistance to people who are most in need of it. Not a single person in over 20 years has told us that they didn't realize our brochure was "advertising," or that they thought a mailing envelope from a law firm meant that they were compelled to open it or respond to it.

To this point I ask: "Exactly what problem is this proposal supposedly addressing?"

2) First, Do No Harm

Placing a "waiting period" on direct mail will no doubt reduce the effectiveness of such advertising, given the concentration of advertising through other media (television, radio, internet, billboards) that is not subject to a waiting period. The result of this will be to

compel direct mail firms to begin, or to increase, their own conventional media advertising presence. One of the virtues of direct mail is that it is targeted toward recipients who are free to discard it, consider it at their leisure, to compare the information packages one to another, and to act upon the information or not as a matter of choice.

By contrast, the conventional media lawyer advertising campaigns cannot be avoided by anyone who watches television, uses a computer, listens to the radio or drives by billboards. It is difficult to rationalize the idea that direct mail should be curtailed as potentially intrusive to the sensibilities of an indeterminate number of recipients (*none*, by my count-please refer to Point 1, above) while saturation advertising in the public media is encountered by *everyone*, regardless of preference or sensibility.

The "waiting period" proposal will do nothing to promote the image of the legal profession, because direct mail does not cause harm to that image by any measure of proof. On the other hand, causing more firms to market their services in the conventional media will *certainly increase* the reality as well as the perception that lawyer advertising is pervasive.

3) Picking Winners and Losers

Direct Mail programs reach only a fraction of the audience available to mass-marketing advertising campaigns involving radio, television and other electronic media. On the other hand, the expenses of developing and sustaining a direct mail system, while substantial, are lower than the expense of maintaining a broadcast advertising presence.

As a result, firms that can establish and sustain a direct mail program are able to compete for business with firms of larger size that spend much greater sums on conventional advertising. No one can credibly support the argument that the firms that spend the most money to advertise are the firms that have the "best" lawyers, or that achieve the "best" results in cases. Direct mail permits smaller firms to "level the playing field" of marketing legal services regardless of advertising budget.

The proposal to place a waiting period on direct mail contact will greatly diminish the effectiveness of this method of advertising, because conventional media will be the only source of comparison that many prospective clients will have during the first few weeks after an incident (the time during which most people feel the need to take "legal action"). Because of the expense involved in developing and sustaining a media-based advertising campaign (and the expense required to create a "brand" that distinguishes one firm from another), it is to be expected that those few firms with sufficient size, capital and name recognition will realize a significant advantage in acquiring clients over those firms that cannot match their advertising budgets.

Reducing direct mail to a marketing after-thought by imposing a waiting period will, simply put, benefit the firms that spend the most on mass-media advertising, while offering no corresponding assurance that the public interest, or the economic interest of the legal profession at large, are promoted or protected.

4) Doing Away With Competition

The fourth point to be made in defense of direct mail advertising is that it represents the most valued characteristics of competition. One may ask "why would anyone respond to a direct mail letter from a lawyer, given the abundance of lawyer advertising present in the mass media?" The answer to this question contains several elements. The first of these is that many of the prospective clients who call in response to direct mail are, to some extent, isolated from the social mainstream due to indigence, the financial and physical devastation of an injury incident, or both. These individuals, and there are many of them, are not using the Internet, or watching television advertisements. They do not have family members who are attorneys, or neighbors who know an attorney. They are not being reached by the "mainstream," nor do they have the means or capability to participate in it.

When such people receive a direct mail package from a lawyer, they may choose to throw it away without more than a glance. However, those who choose to inspect the material find that they are being presented information that focuses upon the legal problems they are having, and that are causing immediate concern and distress. We are aware that the information we send out through the mail can and will be read by an audience with a wide range of legal concerns. All of the self-help tips we provide, each suggestion about working with insurance companies, every representation about our firm's history, all of the testimonials from former clients--every word of our material is carefully considered and will withstand any scrutiny as far as truthfulness and helpfulness are concerned.

Our information packets focus upon the precise problems that potential clients are confronting right now. The material is far more comprehensive, detailed, and "user-friendly" than any of the generalities or cliches present in a television or radio spot. The reader has time to inspect the brochures, look for answers to questions, to seek reassurance in the description of the firm, and its accomplishments, and, perhaps, to sense that there is hope for a connection to the mainstream world, the place from which legal problems and their solutions arise.

Another enormous advantage to the prospective client is that our firm, being of modest size, and unburdened by huge marketing expenses, can offer its services to direct mail clients at a substantial discount from the maximum allowable contingency fee. We have no doubt that many of the clients who hire us do so because we can offer a lower fee. It is inevitable that those in need of legal services, like those in need of any service, will

compare one provider to another, and ultimately base a decision upon "price." Through direct mail, we are able to document to prospective clients that we, like the the big-spending television advertisers, have many years of experience, verifiable outcomes to use as examples, testimonials from countless clients who are grateful for our help, a commitment to high-quality service--and we charge a lower fee!

This is competition at its best. There is a relentless drive to perfect, clarify and focus the material we send out, so that it gives the highest-quality and most useful information to those who need it immediately. Faced with advertising campaigns by larger firms with media budgets we could not equal, we fill a niche by keeping our caseload under control, giving very high "customer" service--and by offering a lower fee. It would no doubt please the mass-media advertising firms to see direct mail diminished by imposing a waiting period upon it. Less pleased would be those clients who will then have no choice but to pay "full fee" to a firm whose size and advertising budget leave no margin for increasing the client's net settlement.

Thank you for the opportunity to present these comments.

Very truly yours,

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SHP:sj